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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL VALENCIA, Defendant and Appellant.	F044732 (Super. Ct. No. CRF03112363) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. Melinda M. Reed, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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By information filed September 10, 2003, Pedro Leon, Maria Platas, and appellant Daniel Valencia were charged with conspiring to manufacture methamphetamine (count 1; Pen. Code, § 182, subd. (a)(1)), and manufacturing methamphetamine while a child

was present and while personally armed with a firearm (count 2; Health & Saf. Code,[1] §§ 11379.6, subd. (a), 11379.7, subd. (a); Pen. Code, § 12022, subd. (c)). Appellant and Platas were further charged with providing a place for the manufacture of methamphetamine while personally armed with a firearm (count 3; § 11366.5, subd. (a); Pen. Code, § 12022, subd. (c)) and child endangerment (count 4; Pen. Code, § 273a, subd. (a)). Following a jury trial, appellant was convicted of counts 1 through 3 and found to have been personally armed with a firearm with respect to counts 2 and 3. The special allegation of manufacturing methamphetamine while a child was present was found not true as to count 2, and appellant was acquitted of count 4. Leon was acquitted of all charges. Platas was acquitted of counts 3 and 4, but the jury was unable to reach a verdict on counts 1 and 2.

Appellant was sentenced to prison for the middle term of five years on count 2, plus a consecutive term of four years for the firearm enhancement, for a total of nine years. Total terms of six years and five years were imposed on counts 3 and 1, respectively, but were stayed pursuant to Penal Code section 654. Appellant was also ordered to pay various fines and penalties. He filed a timely notice of appeal, and now raises claims of evidentiary insufficiency and instructional error. For the reasons that follow, we will affirm the judgment in its entirety.

FACTS

As of July 2003, Matthew Quatacker owned farmland on Avenue 136 in Tipton. He lived in a house on the property, and had been renting a doublewide mobile home behind his residence to appellant for the previous four and a half to five years. Appellant's sister, Maria Platas, had moved in with appellant approximately four months

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[1] Further statutory references are to the Health and Safety Code unless otherwise stated.

earlier. At times, Quatacker saw her young children playing in the yard.[2] Sporadically, he saw people coming and going. Some days, there would be nothing. Other days, there would be cars coming and going in the afternoon and late evening. Traffic increased after Platas moved in. Quatacker saw Pedro Leon on the premises dozens of times over the three or four months preceding the arrests, sometimes when cars would come to the premises. Sometimes when Quatacker saw him, Leon would be working on vehicles, although nothing ever seemed to get fixed. Leon and others appeared to be just milling around the cars. Quatacker never smelled any suspicious odors.

Sheriff's Sergeant Jennings went to the location on July 4, 2003. Three cars were parked directly in front of the trailer. It did not appear they were being worked on. The trailer's front windows were covered with something, while the back windows were covered with black plastic.

Jennings returned to the location late on the morning of July 6. Four vehicles were parked there. These were not the same cars that had been there before; none was registered to appellant or being worked on, although there was a car in the garage that appeared to be disabled.

While he was running checks on the vehicles, Jennings saw Leon exit the front door of the mobile home. He appeared to put a cell phone to his ear and start talking as he walked outside. He made eye contact with Jennings, who was in uniform and a

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[2] According to Ernesto Nunez Aguilar and his wife, Aurora Magana Moreno, Platas had been living with them for several months as of July 6, 2003. Platas's children were residing with Platas's daughter, Jessica. Platas testified that she moved into appellant's residence near the end of March or beginning of April, but she was only there for about two weeks because Quatacker told appellant that she had to leave. It was then she moved to Magana Moreno's house. She left some of her belongings at appellant's residence.

marked patrol vehicle; walked to one of the cars; got in or reached in for a couple of seconds; then returned to the trailer. He remained on the cell phone the entire time.

Shortly after, Jennings changed his location so that he could better see the vehicles' license plates. He could now hear what sounded like a door opening on the back of the trailer and things being shuffled around. It sounded like boxes being moved and glass clanking together. The sounds, which Jennings heard intermittently for four or five minutes, came from different sides of the trailer. In the front yard, Jennings saw a yellow, industrial-type mop bucket that was turned over on its side. On the north side of the house, he could see numerous orange, five-gallon buckets on their sides, as well as two large drums. On the south side of the house was a large, possibly five-gallon, propane tank next to a barbecue. Jennings did not recall whether it was attached. The appearance of the items was like lab dumpsites Jennings had previously observed.[3]

Less than four or five minutes after he saw Leon, Jennings observed Platas and another female exit the trailer. They did not make eye contact with him, but instead tilted their heads down and away. They got into the vehicle to which Leon previously had gone, then drove off. Platas was in the passenger seat.[4]

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[3] A lab dump is where the by-products, debris, and waste are disposed of by the people involved in manufacturing methamphetamine.

[4] A few days after these events, officers went to the residence of Nunez Aguilar and Magana Moreno to look for Platas. Nunez Aguilar's daughter informed them that Platas had telephoned her and said that if the officers came, to call her so that she could hide. As a result, officers went to the residence of Sonia Ayala. There, they found Platas on the floor of the bedroom, hiding underneath some pillows. According to Platas's testimony, she was only visiting appellant and received a ride to Magana Moreno's house from appellant's girlfriend. She denied being involved in manufacturing methamphetamine, saying such a thing to Nunez Aguilar's daughter, or hiding when the police came to Ayala's residence.

Jennings observed appellant go in and out of the trailer several times. Initially, he came out and looked right at Jennings, who waved. Jennings could not recall whether appellant acknowledged him. Each time, appellant walked around different areas of the residence, moving his head back and forth between Jennings and where he was going. He appeared nervous. Leon subsequently reappeared behind the trailer. He, appellant, and another man sat on or rested against a bench at the corner of the trailer for several minutes. They appeared to be having a conversation. All three were facing Jennings. Appellant looked directly at Jennings and spoke back and forth to the other men. All three appeared nervous.

On this day, there was a light, intermittent breeze. Occasionally, Jennings caught a whiff of a chemical odor. He had smelled similar odors at labs that were active or had recently been active, and at lab dump sites. The odor seemed to be coming from the trailer area.

Deputy Pinon arrived just as Jennings was leaving to give chase to a car that had come in and, upon seeing Jennings, immediately left. As Pinon parked his patrol vehicle, appellant walked over to him. Appellant said he lived there. Pinon could smell a strong chemical odor. When he asked appellant whether appellant could smell it, appellant said no. Appellant consented to a search of the premises. Pinon conversed with appellant, Leon, and the third man while waiting for other officers to arrive. During this conversation, Pinon could see scales, tubing, containers, a toolbox, and other items on and near the patio.

When Jennings returned, he and Pinon began a brief search. The closer they got to the trailer, the stronger the odor became. It was very pungent near the door and window areas and toward the back. Outside the back door were some boxes that contained glassware, tubing, stained sheets, stained hoses, red phosphorous, and other items associated with manufacturing methamphetamine. The items appeared to have been loosely thrown into the boxes. There were also numerous buckets along the back of the

house that bore dark brown or reddish stains. None of these items were dusty or dirty. There were stained and yellow or dead areas all over the lawn; there was also kitty litter, despite the fact no cats were seen at the location. When Pinon asked, appellant said he did not know anything about the items. Once the officers saw obvious signs of manufacturing, they quickly swept the trailer for additional suspects, then went outside and detained everyone. A loaded .25-caliber handgun magazine was found in one of appellant's pockets. A .25-caliber handgun subsequently was found in a bag on a makeshift shelf within two to three feet of where appellant, Leon, and the other man had been. The clip found in appellant's pocket fit the gun.

Jennings contacted law enforcement units specializing in the investigation of potential methamphetamine labs. He believed the lab had been active within the past week.

Tulare County Sheriff's Detective Campos was attached to the southern Tri-County HIDTA task force, a multi-agency task force involved in the investigation of methamphetamine laboratories and large-scale methamphetamine distribution in Kern, Kings, and Tulare Counties. He testified at trial as an expert in the manufacturing of methamphetamine, and explained a common means of making the drug, the pseudoephedrine HI red phosphorous method.

The first part of the process is the extraction phase, in which pseudoephedrine is obtained, usually from cold tablets. Alcohol or another solvent, heated in a large metal pot over a Bunsen burner attached to a propane tank, is usually used to separate the pseudoephedrine from the cornstarch or binder contained in the pills. A large, drill-type beater may be used to speed up the process by grinding up the pills. Once the alcohol evaporates, crystallized pseudoephedrine remains. This is the precursor that is the main ingredient of methamphetamine.

To change the molecular structure of the pseudoephedrine so that it becomes methamphetamine, heat and other ingredients are added. A glass or metal container is

used; large "cooks" typically involved use of a 22-liter flask. Pseudoephedrine and hydriodic or other acid, plus red phosphorous (a catalyst which helps the process along but does not become part of the final product), are mixed together in the container with a heat source, thereby changing the molecular structure of the pseudoephedrine. A filter is placed at the top with a tube or hose--frequently, a radiator hose--coming from it, in order to vent the harmful vapors into five-gallon buckets or ice chests full of kitty litter or ice.

Next is the separation phase, which begins with the substance as an extremely acidic liquid that is not consumable. It is poured into another vessel and a caustic solution--often, Lewis Red Devil Lye--is added to neutralize the acidity. To prevent an explosive reaction, many pounds of ice must be dumped into the same vessel. In a large cook, this part of the process requires at least three to four people. At this point, another caustic substance is added to the mixture.[5] It separates the methamphetamine and the waste products into layers, and the layer of methamphetamine is then drained off in a separatory funnel.

After the separation phase, pure methane solution is left. It is methamphetamine, but in liquid form. Hydrochloric gas is applied through a hose from some sort of cylinder, such as a small air or oxygen tank, and this causes the methamphetamine to solidify and drop to the bottom.[6] A barrel with a sheet held on by bungee cords is then used as a filter; the liquid waste is poured into it, and the solidified methamphetamine is caught on top of the sheet. A presser and a bucket are used to strain out the methamphetamine one more time; once it is dry, it is finished product.

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[5] Freon used to be the substance of choice, but, because of restrictions on it, Coleman Fuel is now being used.

[6] Hydrochloric gas can be made by combining rock salt and sulfuric acid, or tin foil and muriatic acid, in an air tank or oxygen cylinder. These substances produce their own gas.

On July 6, 2003, Campos responded to the suspected methamphetamine lab at issue in this case. The remote location was a good one for a lab. When Campos exited his vehicle, which was parked approximately 35 to 50 yards from the trailer, he could smell the distinct odor of a lab. The trailer's windows were covered with black plastic trash bags. A lid from a metal pot of the size commonly used for extracting ephedrine from pills was lying on one of the appliances. A bucket of stained cloths was concealed by some plywood. Such rags are typically found in laboratories because they are used for filtering during several steps of the manufacturing process. Inside the trailer were an industrial-size mop bucket and ringer, despite the fact the trailer contained only a small piece of linoleum. Such buckets are always found in labs. Also found--again, always found at labs--were orange Homer's all-purpose buckets. One contained kitty litter that had been used for venting fumes and vapors.

Inside the residence, ice bags were found in a refrigerator-freezer. There was an amber brownish staining on the floor, with a half circle pattern indicating that something circular had been there and someone poured something into or out of it. Such a pattern is frequently found where 22-liter heating mantels have been placed and ingredients poured in, with spillage occurring. There were areas of carpet in the residence that were stained. The brown staining was caused by iodine, which is used to make hydriodic acid. The red staining was caused by red phosphorous. In the master bedroom was a yellow tank of the type used to make hydrochloric gas. A container of iodine solution, from which iodine could be extracted, was also found. A mixture of brown and red staining, which was acidic, was found in two of the bedrooms.

Stainless steel pots--the type typically seen at labs--were found in the kitchen sink. A beaker, consistent with use in a smaller user lab, was found inside a kitchen cabinet. Stains on the beaker were consistent with iodine. There was duct tape on the top of the beaker; such tape frequently is used to hold a hose in place so that the fumes can be vented off during cooking. A hot plate, which is typically used as a heating source in a

smaller operation, was also found. Latex gloves, which are usually worn by someone cooking methamphetamine, were found in the cabinet. A bag containing over 20 pounds of rock salt was found in the kitchen. A round white ring was found on the carpet in one of the bedrooms. Such staining usually occurs during the cooking process, where the heat source and the mantels are used. The white staining is caused by powdered pseudoephedrine. A fan with the face off was found in the living room. Fans are often used at labs to ventilate or circulate the air. Frequently, their faces will be removed so that the powder build-up does not cling to the screen in front, thereby allowing the fan to produce better air motion. A hose with duct tape on both ends was found. It was a venting hose. When red phosphorous is heated, it generates phosphine gas. Because this is so hazardous, both ends of the ventilation hose are covered until disposal. On a table were white rings that are typically seen at larger lab sites. A hydrochloric gas generator was found sitting on top of an orange bucket that contained contaminated kitty litter. Five-gallon buckets, commonly found at labs, were located. Brown residue staining consistent with iodine was inside, indicating they had been used in manufacturing methamphetamine. A propane tank was found; such tanks are attached to the Bunsen burners that are used in the extraction phase. A can of paint thinner was found; it is a commonly-used solvent.

In a tool box found near the back door, officers found a plastic baggy containing 2.8 pounds of red phosphorous, a baggy containing almost half a pound of red phosphorous, a baggy containing 2.2 pounds of red phosphorous, a twisted paper towel containing one ounce of red phosphorous, a torn plastic bag containing approximately one ounce of red phosphorous, and a container with one and a half ounces of red phosphorous. While the type of glassware found in the toolbox (flasks ranging in size from 125 to 1,000 milliliters) indicated the presence of a small, user-type operation, the fact there were baggies containing different weights of the substance indicated different amounts of methamphetamine were being produced and that a much larger operation was

also going on. For example, the 2.2 pounds contained in one baggy would have been used in a 22-liter vessel. The one ounce found in a paper towel would have been used in the small beaker to produce one to two ounces of methamphetamine. Also in the toolbox was an ounce of an off-white, chunky substance which was consistent with a cutting agent, which is used to increase the amount of finished product. The toolbox also contained a beaker with black sludge in it. The sludge was typically seen at lab sites; it was a waste product that was a by-product of the manufacturing process.

Officers also found plastic wrap, which is commonly found at lab sites and in large-scale distribution, and which is used to wrap the finished product. A scale of the type commonly used to weigh ingredients and finished product was found, as was a smaller scale. A scale for smaller weights indicated someone was breaking down the larger increments into smaller dose amounts for resale. White residue was found on one of the scales. It appeared to Campos that finished product had been weighed on that scale. Eighteen-ounce containers of Lewis Red Devil lye were found, as was a drill with a stir wand bearing white residue, which indicated it had been used to break up pseudoephedrine pills. Also found were a number of blister packs containing cold medications in which pseudoephedrine was an ingredient. There were also other canisters that appeared to contain pseudoephedrine-type dietary supplements. A venting system used in a large-scale manufacturing process was also found. The hoses were of a diameter that could fit over a 22-liter flask. A 16-ounce container of lighter fluid was found. Lighter fluid is often used in place of Coleman Fuel or Freon in a small cook, although a Coleman Fuel can was also found at the scene.

There were five buckets that contained kitty litter. All were about half full. The pH of one indicated it had been used several times. At least three hot plates were found. A one-quart container of muriatic acid was found; the acid could have been used to create hydrochloric gas, as well as hydriodic acid. Pieces of torn sheet were found; they were consistent with use as filters in a small lab operation. A gallon container of three percent

hydrogen peroxide, half full, was found. Hydrogen peroxide and salt can be used to create hydrochloric gas. Coffee filters (but no coffeepot) were found; they are used instead of torn sheets in small lab operations. The presence of a glass smoking pipe with carbon build-up and residue indicated there was use as well as manufacturing taking place at the residence. It is common for persons who manufacture methamphetamine also to use it.

Based on his observations, Campos opined that the red phosphorous HI pseudoephedrine reduction process of manufacturing methamphetamine was being used at this location. A one- to two-ounce cook could be performed in eight to 12 hours. A large cook, using vessels of the size found, would take two to two and a half days from start to finish. Different stages would require different numbers of people. A 22-liter flask would produce eight to twelve pounds of methamphetamine. The cook would require four to five people. A 1,000-milliliter flask could produce up to a pound and the cook could be handled by two people. One person could handle a one-ounce cook. Given the amount of red phosphorous, different sizes of vessels, large buckets, strong odor in the area, and saturated carpets, Campos opined that more than one cook had occurred at the site, and that both large-scale cooks and smaller, personal-type cooks had been occurring.

Based on everything he found, Campos believed this could have been a super lab. Any time one or more of the larger vessels is being used, it is considered a super lab. Such a lab is usually run by, or has ties to, a Mexican cartel. A super lab is always multi-pound and generates many thousands of dollars for the people in control of it. The people found at such a lab are not usually the benefactors of this money.

There was no cook in progress on July 6, and not all of the necessary ingredients were present.[7] However, evidence of a prior, recent cook was visible, and Campos opined that a small cook of an ounce or less had occurred at the site within a day or two earlier.[8] He based this opinion on the fact rags were found that still had moisture on them, despite the summer heat. In addition, glassware consistent with a small cook was found in the bathtub with drops of water still adhering to it, like it recently had been washed.

Campos opined that a larger cook had occurred at least two to three weeks earlier. He acknowledged that no 22-liter flask or indicia of sales, such as pay-owe sheets, were found at the site. Similarly, there was no cash at the residence. However, large amounts of cash are typically not found on those arrested at labs, but instead generally are found only on members of the upper echelon of the organization. The people at the labs are usually the expendable "mopes." There was an area of dead grass and staining in back of the trailer where several gallons had been poured out. A small cook would not generate a gallon of waste, as for every pound of methamphetamine produced, five to six gallons of waste may be generated. Moreover, finished product is not always found at labs. In Campos's experience, that is because the drug has been packaged and shipped out. Campos, who had personally performed surveillance of methamphetamine labs, found Leon's described conduct of standing out by the cars, as well as having and using the only cell phone found on the premises, to be consistent with the activity of a lookout.

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[7] There was enough red phosphorous, salt, and sulfuric acid. Larger cooking vessels, a larger heating source, 22-liter heating mantels, hydriodic acid, and pseudoephedrine were still needed.

[8] An ounce is "a lot" for a user.

If there is no finished product to establish that methamphetamine was produced at a location, samples can be taken of the red phosphorous or other waste, and traces of methamphetamine will be found. Samples were taken here. A sample of red phosphorous was contaminated with methamphetamine, indicating the red phosphorous previously had been used in a manufacturing process and had been recycled.[9] A sample of cloth with brown stains showed that methamphetamine was present, which was consistent with the cloth having been used at any of several steps in the manufacturing process. A sample of brown residue contained methamphetamine as well as either ephedrine or pseudoephedrine. Although there were other possibilities, the most likely was that the cook was not carried out long enough, and so the precursor--either ephedrine or pseudoephedrine--was not completely converted into methamphetamine. A piece of plastic tubing tested positive for methamphetamine and Phenyl-2-Propanone (commonly referred to as P-2-P), which is formed as a by-product of the red phosphorous iodine method of manufacturing methamphetamine. A sample of small white beads showed the material to be consistent with sodium hydroxide, which is one of the chemicals that is used after the cook to neutralize acidity. A sample of gray solids tested positive for iodine. Iodine is used in the cooking process. Based on his analysis of the various samples, Steven Patton, a senior criminalist with the California Department of Justice at the Fresno Regional Laboratory, opined that methamphetamine was being manufactured and that the basic recipe involved ephedrine or pseudoephedrine or both being converted into methamphetamine using the red phosphorous iodine method.

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[9] Red phosphorous is frequently used more than once, and maintains its catalytic effect in converting the ephedrine or pseudoephedrine molecule to methamphetamine.

DISCUSSION

I. Insufficiency of the Evidence

Appellant contends the evidence was insufficient to sustain his convictions for conspiring to manufacture methamphetamine (count 1) and manufacturing methamphetamine (count 2). We disagree.

The standards of appellate review are settled. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*Ibid.*) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) "A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] … A finding of fact must be an inference drawn from evidence rather than … a mere speculation as to probabilities without evidence.' [Citations.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5, & 545, fn. 6.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). Furthermore, an appellate court can only reject evidence accepted by the trier of fact when the evidence is inherently improbable and impossible of belief. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.)

We turn first to count 1. "'The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the agreement.

[Citations.]'" (*People v. Butts* (1965) 236 Cal.App.2d 817, 829.) "Conspiracy is a 'specific intent' crime. [Citations.]" (*People v. Horn* (1974) 12 Cal.3d 290, 296, disapproved on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1238.) "Thus, 'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.' [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1131; Pen. Code, §§ 182, 184.)[10]

"'The existence of the conspiracy may be established by circumstantial evidence. [Citation.]'" (*People v. Butts, supra,* 236 Cal.App.2d at p. 829.) Indeed, because "[e]vidence of a defendant's state of mind is almost inevitably circumstantial" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208), "[c]ircumstantial evidence often is the only means to prove conspiracy. [Citations.] There is no need to show that the parties met and expressly agreed to commit a crime in order to prove a conspiracy. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The inference can arise from the actions of the parties, as they bear on the common design, before, during, and after the alleged conspiracy. [Citation.] While mere association with perpetrators of crime does not establish participation in a conspiracy, it does provide a starting point. [Citation.] As one court has noted, the maxim that '"One's actions speak louder than words" is peculiarly applicable to proof in conspiracy cases.' [Citation.]" (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.)

Appellant was charged in count 1 of the information with conspiring to manufacture methamphetamine with Leon, Platas, "and with another person and persons

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10 Appellant's jury was given a full range of conspiracy instructions.

whose identity is unknown ….” He points out that neither Leon nor Platas was convicted of this charge. He recognizes that, under the law applicable to inconsistent verdicts, this does not automatically mean his conviction cannot stand. (*People v. Palmer* (2001) 24 Cal.4th 856, 864-865.) Nevertheless, he contends there is no substantial evidence that he entered into an agreement with anyone.

“‘Although a conspiracy may be proved by circumstantial evidence, there must be some evidence from which the unlawful agreement can be inferred before criminal liability may be imposed on the basis of conspiracy.’ [Citation.]” (*People v. Drolet* (1973) 30 Cal.App.3d 207, 218.) On the other hand, “‘[a]lthough it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’” [Citations.]’ [Citation.]” (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

Appellant contends that the only connection between named coconspirators Leon and Platas and any drug manufacturing was their association with appellant and presence at his home, and he points out that “[m]ere association alone cannot furnish the basis for a conspiracy. [Citation.]” (*People v. Drolet, supra,* 30 Cal.App.3d at p. 218.) At least with respect to Platas, we disagree that association and presence provided the only evidence. Moreover, appellant was also charged with a person or persons whose identity was unknown. Such a charge will support a conviction for conspiracy. (See *People v. Richards* (1885) 67 Cal. 412, 419; *People v. Roy* (1967) 251 Cal.App.2d 459, 463.)

We have set out the evidence adduced at trial at length in the statement of facts, *ante*, and need not repeat it in detail. That evidence showed that, as appellant concedes, methamphetamine recently had been produced at the mobile home where appellant, by

his own admission, resided. The evidence showed that he had lived there for several years. Although there was evidence of a recent small cook, which could have been handled by one person, Campos gave an expert opinion that a large cook--which would have required four to five people--had taken place at the location within two to three weeks prior to the search. The physical evidence found in the search supported this opinion. Appellant exhibited consciousness of guilt by denying any knowledge of the items found in and around his residence, many of which were in plain sight. (*People v. Maury* (2003) 30 Cal.4th 342, 399; *People v. Earp* (1999) 20 Cal.4th 826, 889.) Quatacker testified regarding traffic in and out of the location, and how it increased after Platas appeared on the scene. Platas exhibited consciousness of guilt by attempting to hide from arresting officers. (*People v. Dabb* (1948) 32 Cal.2d 491, 500; *People v. Kelly* (1928) 203 Cal. 128, 138.) In light of the foregoing, we conclude sufficient evidence was presented from which a reasonable trier of fact could have found, beyond a reasonable doubt, that appellant conspired with Platas or some unknown person(s) to manufacture methamphetamine by, as alleged in the information, providing a location and/or providing apparatus and chemicals. Accordingly, the conviction on count 1 must stand. (See *People v. Bloom, supra,* 48 Cal.4th at p. 1208.)

We turn now to count 2. Section 11379.6, subdivision (a) criminalizes the conduct of "every person who manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis," methamphetamine. "The conduct proscribed by this section encompasses the initial and intermediate steps carried out to process a controlled substance. [Citation.] In other words, the statute makes it unlawful to engage in the chemical synthesis of a substance as one part of the process of manufacturing a controlled substance." (*People v. Coria* (1999) 21 Cal.4th 868, 874.)

Appellant phrases his argument thus: "While there was substantial evidence suggesting that methamphetamine had been produced at the location in the past, there

was no evidence whatsoever that appellant was currently engaged in any stage--from inception to completion--of the drug manufacturing process. As the statute is aimed at ongoing manufacturing operations, there can be no basis for the present conviction." Appellant concedes that a pot need not be bubbling, such that the finished product would have been obtained had the police not interceded. However, he argues there was no evidence that any intermediate step was *ongoing*, despite the red phosphorous found contaminated with methamphetamine, which would indicate the red phosphorous was previously used in manufacturing and recycled, i.e., evidence of an intermediate manufacturing step. To accept appellant's argument would appear to us to require precisely what he agrees is *not* required: a bubbling pot.

In *People v. Lancellotti* (1993) 19 Cal.App.4th 809, the defendant's storage locker contained virtually all of the equipment needed to produce methamphetamine, as well as a precursor, chloropseudoephedrine. Two expert witnesses, one of whom was a criminalist, opined that the contents of the storage locker were being used to manufacture methamphetamine, although the criminalist testified that she could not say that the manufacture of methamphetamine was actually taking place at the time the locker was opened. (*Id.* at p. 812.) The appellate court rejected the defendant's claim of insufficient evidence of manufacturing: "The cumulative nature of the evidence in appellant's case, including the contents of the locker which all taken together are only used in the manufacture of methamphetamine, the presence of chloropseudoephedrine, a substance which cannot be purchased and is used only in the manufacture of methamphetamine, and the odor emanating from the locker, provide substantial evidence that the manufacture of methamphetamine, an incremental and not instantaneous process, was in progress." (*Id.* at p. 813.)

In *People v. Heath* (1998) 66 Cal.App.4th 697, the police executed a search warrant at a commercial premises, where extensive foot, bicycle, and vehicle traffic, increasing as the hour grew late, had been observed. As described by the Court of

Appeal, "The premises had a distinctive odor associated with methamphetamine manufacture. Officers found numerous items used in, or indicative of, the manufacture of methamphetamine, including chemicals, laboratory equipment, pay-owe sheets, chemical notations, a reference book open to a page showing pseudoephedrine sources, coffee filters containing chemical residues, methamphetamine pipes, syringes, and a mirror with a white powdery substance divided into lines for inhaling.… [¶] … [¶] An investigating officer concluded methamphetamine was being manufactured on the premises using a process of ephedrine extraction. Based on observation of the premises and the items located there, a criminalist reached the same conclusion. The parties stipulated that another criminalist performed a chemical analysis of filter paper found at the premises and discovered methamphetamine, iodine, and phosphorus, which in his opinion demonstrated the manufacturing of methamphetamine was occurring. After the initial step of the process that was being used at the premises, methamphetamine is produced but is not in usable form because it is combined with hydriodic acid. Similarly, each subsequent step of the process produces methamphetamine, though it is not in usable form until the final step." (*Id.* at pp. 701-702.) The appellate court rejected the defendant's claim of insufficient evidence: "The express terms of Health and Safety Code section 11379.6 subject to liability not only one who 'manufactures' a controlled substance, but also one who 'compounds, converts, produces, derives, processes, or prepares' such a substance. [Citation.] It is evident from the Legislature's use of such all-encompassing language that it intended to criminalize all acts which are part of the manufacturing process, whether or not those acts directly result in completion of the final product. [¶] Although it is possible to conceive of a case in which the acts undertaken are too preliminary in nature to fall within even the broad language of the statute, this is not such a case. Rather, as discussed *ante*, the parties stipulated that chemical analysis showed methamphetamine *had been produced* by the time of the search." (*Id.* at p. 705.)

In the present case, jurors were instructed that production of methamphetamine was one means by which section 11379.6, subdivision (a) could be violated. The evidence showed that red phosphorous contaminated with methamphetamine was found, indicating the red phosphorous had been used in manufacturing and was being recycled. In addition, staining on a cloth revealed the presence of methamphetamine; a brown residue was found to contain methamphetamine and the precursor ephedrine or pseudoephedrine; and tubing was found to contain methamphetamine and P-2-P, a by-product of the manufacturing method being used. Viewed as a whole (including expert testimony concerning the presence of the characteristic odor of methamphetamine labs, the nature of the equipment found and use in the manufacturing process, types and amounts of staining, quantities of red phosphorous, and the like), the evidence amply establishes that the manufacturing process had taken place and that methamphetamine had been produced by the time the premises were searched. (See *People v. Heath, supra,* 66 Cal.App.4th at p. 705; *People v. Combs* (1985) 165 Cal.App.3d 422, 427 [evidence that phencyclidine manufacturing had taken place "overwhelming" in light of presence of nearly all equipment and materials necessary for manufacturing, plus quantity of actual substance].) The jury thus properly convicted appellant on count 2, despite the fact not all of the ingredients needed to create the finished product were present at the moment of the search.

II. Instructional Error

Appellant contends his conviction on count 3--providing a place for the manufacture of methamphetamine--must be reversed because the trial court failed to instruct the jury on all the elements of the offense. Respondent concedes the error, but claims it was harmless. We agree.

Appellant was convicted in count 3 of violating section 11366.5, subdivision (a), which provides: "Any person who has under his or her management or control any

building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly rents, leases, or makes available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance *for sale or distribution* shall be punished by imprisonment in the county jail for not more than one year, or in the state prison." (Italics added.) Unlike section 11379.6, section 11366.5 requires that the accused have knowledge that the substance is being manufactured or stored for the purpose of sale or distribution to others. (*People v. Sanchez* (1994) 27 Cal.App.4th 918, 923; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1209, 1211; *People v. Costa* (1991) 1 Cal.App.4th 1201, 1207.) The instructions given here omitted this element.[11] Accordingly, as respondent recognizes, the trial court erred (see *People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334), and appellant's lack of objection to the instruction as given does not preclude us from addressing the issue (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7).

"Under state law, instructional error that withdraws an element of a crime from the jury's consideration is harmless if there is 'no reasonable probability that the outcome of

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11 Jurors were instructed: "Defendants Daniel Valencia and Maria Platas are accused in Count 3 of having committed a violation of Section 11366.5 of the Health and Safety Code on July 6, 2003, a crime. Any person who has under his or her management or control any building, room, space, or enclosure either as an owner, lessee, agent, employee, or mortgagee, who knowingly rents, leases or makes available for use with or without compensation the building, room, space, or enclosure with the specific intent to allow the unlawful manufacture, storage or distribution of a controlled substance such as methamphetamine is guilty of a violation of Health and Safety Code Section 11366.5, a crime. [¶] In order to prove this crime each of the following elements must be proved. Number 1, a person made available anyplace; and Number 2, that person did so knowing the place was going to be used to unlawfully manufacture, store, or distribute a controlled substance such as methamphetamine. And Number 3, the place provided was under the control or management of the defendant."

defendant's trial would have been different had the trial court properly instructed the jury.' [Citations.] Under federal law, the 'Fifth Amendment right to due process and Sixth Amendment right to jury trial … require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime.' [Citations.] Accordingly, a trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict. [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1208-1209; accord, *Neder v. United States* (1999) 527 U.S. 1, 11-16; *People v. Flood, supra,* 18 Cal.4th at pp. 490, 502-504.)

In the present case, although glassware found at the mobile home was consistent with smaller cooks and there was evidence of personal use, the evidence was uncontradicted that even just an ounce of methamphetamine was a large amount for personal use. Most of the equipment was capable of producing an ounce or more of finished product. Moreover, while no 22-liter flask was found, a venting system for such a flask, as well as staining consistent with a heating mantel for a flask that size, were found. Extremely significant is the fact that, while one container of red phosphorous was consistent with a small, personal-use-type cook, the other weights were only consistent with use in large-scale cooks. The only reasonable inference to be drawn concerning methamphetamine manufacturing using any but the smallest flasks is that the product was for sale or distribution, as opposed to personal use, and the prosecutor presented expert opinion that large-scale cooks, as well as smaller ones, had occurred at the location. Campos's opinion that this was a so-called super lab with ties to a Mexican cartel may have been somewhat speculative, given the state of the evidence. Nevertheless, the jury had no basis upon which to conclude that appellant knowingly permitted methamphetamine to be manufactured or stored at his residence *solely* for personal use and not also for sale or distribution to others. Since, on the evidence presented here, no

rational jury could have found the missing element unproven, the error is harmless beyond a reasonable doubt. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 416.)[12]

DISPOSITION

The judgment is affirmed.

_____
Levy, J.

WE CONCUR:

_____
Harris, Acting P.J.

_____
Wiseman, J.

[12] It follows from our conclusion that appellant cannot prevail on his claim of ineffective assistance of counsel, as he cannot establish that, in the absence of counsel's purported failings, a more favorable outcome was reasonably probable. (See *People v. Hamilton* (1988) 45 Cal.3d 351, 377.)